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Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,
v.
LOUISIANA POWER & LIGHT CO., ET AL.,
Respondents.

No. 71-1040

UNITED GAS PIPE LINE CO. and
PENNZOIL UNITED, INC.,
Petitioners,
v.
LOUISIANA POWER & LIGHT CO., ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF HUMBLE OIL & REFINING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE HUMBLE OIL & REFINING COMPANY

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MOTION OF HUMBLE OIL & REFINING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Humble Oil & Refining Company ("Humble") respectfully moves the Court for leave to file a brief *amicus curiae* on the merits in these proceedings. Such brief will relate to only one of the questions presented in the

brief filed by the Solicitor General of the United States on behalf of the Federal Power Commission ("Commission") in Case No. 71-1016, *Federal Power Commission* v. *Louisiana Power & Light Co., et al., i.e.* (Br. p. 2):[1]

> "Whether the Federal Power Commission, rather than the courts, should make the initial determination of the Commission's jurisdiction to issue a certificate of public convenience and necessity authorizing a jurisdictional interstate pipeline company to continue to operate certain pipeline facilities."

In its brief Humble will also deal with the question presented by United Gas Pipe Line Company and Pennzoil United, Inc. (hereinafter referred to as "United"), in Case No. 71-1040, *United Gas Pipe Line Co. and Pennzoil United, Inc.* v. *Louisiana Power & Light Co., et al., i.e.* (Br., p. 2):

> "Whether a court has jurisdiction to determine the Federal Power Commission's jurisdiction over facilities being operated by an interstate pipeline when the jurisdictional issue presented to the court is at that very time being litigated at the Commission."

The Solicitor General of the United States, on behalf of the Commission (No. 71-1016), counsel for United (No. 71-1040), and counsel for Louisiana Power & Light Co. ("LP&L"), have consented to the filing of Humble's brief *amicus curiae*. The original copy of the letter consents received from such parties are being lodged with the Clerk of the Court simultaneously with the filing of this Motion and Brief. Humble previously submitted a motion for leave to file a brief *amicus curiae* in these proceedings in opposition to the petitions for certiorari. This Court granted Humble's motion.

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[1] Humble would *emphasize* at the outset that its brief does not deal with the question of the Commission's authority to allocate the gas supplies of jurisdictional pipeline companies, among the customers of such companies, in times of gas supply shortage.

Humble submits that its participation herein as *amicus curiae* will materially assist the Court in its determination of the issues presented.

Respectfully submitted,

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Dated at Washington, D.C.

this 12th day of April, 1972

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BRIEF OF AMICUS CURIAE HUMBLE OIL & REFINING COMPANY

INTRODUCTION

Humble is an independent producer of natural gas. It sells substantial volumes of gas both in interstate commerce, subject to Commission jurisdiction, and in intrastate commerce. Humble's interest herein arises from its

sales to United of gas produced in Louisiana under firm contractual commitments which effectively require that the gas be utilized only in intrastate commerce. In reaching its decision in a private suit between United and LP&L, the Fifth Circuit held in *Louisiana Power & Light Co.* v. *United Gas Pipe Line Co., et al.* (5th Cir., No. 71-2550, judgment entered January 14, 1972), —— F.2d ——,[1] that United's Green System into which Humble's gas is delivered is operated in intrastate commerce, not subject to the Commission's jurisdiction. The Commission and United contend that the judgment of the Fifth Circuit should be reversed on the basis that the jurisdictional issue should have been determined in an administrative proceeding. Humble believes that the Court below properly applied the discretionary doctrine of primary jurisdiction in the circumstances of this case where all the determinative jurisdictional facts were

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[1] United Apps. A and B, pages 1a-29a. With the filing of its petition for writs of certiorari, United submitted several appendices including, among other things, the opinion and judgment of the Court below. References herein shall be to United's appendices to its petition for writs of certiorari. "A" will refer to the Appendix submitted to this Court by the Commission; "R" will refer to the printed record filed with the Court below; and "T" will refer to the transcript of the proceedings in United Gas Pipe Line Co., Docket No. CP71-89. On February 9, 1972, the Commission issued its Opinion No. 610 "Opinion and Order Finding Jurisdiction and Remanding Proceeding for Receipt of Additional Evidence" in Docket No. CP71-89, wherein it determined, *inter alia*, that United's Green System is subject to its jurisdiction (United App. F, pp. 91a-131a). On April 7, 1972, the Commission issued its Opinion No. 610-A, "Opinion and Order Denying Applications for Rehearing, Petition for an Investigation and Motion for Stay." Those Opinions are now on appeal in Humble Oil & Refining Company v. Federal Power Commission (Case No. 72-1720, 5th Cir.). Opinion No. 610-A is attached hereto as Exhibit "B." As Commissioner Carver notes in his dissent to such Opinion, the facts, upon which the Commission bases its jurisdictional conclusions in Opinion No. 610 are contrary to the record evidence. Moreover, Commissioner Carver charges that the relevant jurisdictional conclusions in such Opinion seem clearly to be based upon *ex parte* advice from the Commission's Staff. The validity of the entire Opinion is seriously in doubt.

presented to it with full participation and by the voluntary action of the Commission.

Moreover, as *amicus*, Humble submits that acceptance of the position espoused by the Commission and United contains implications far beyond the primary jurisdiction issue. In effect, the Commission and United contend that one party may, in defiance of its contracts and of law, seek shelter from its contractual obligations and refuge from its wrong doing by claiming that the doctrine of primary jurisdiction requires the Court to await and adopt the Commission's decision on jurisdiction. In the natural gas industry, which is built upon valid and enforceable long-term contracts between producers and pipelines, such a result would destroy reliance upon contractual commitments, and with that destruction, the foundation of the industry would be endangered.

QUESTION PRESENTED

Was the Court below required by the doctrine of primary jurisdiction to refrain from deciding the purely legal question whether United's Green System is subject to the Commission's jurisdiction, where, in a private law suit: (1) the Court had before it the essential operating characteristics of the pipeline facilities involved and the relevant jurisdictional facts were developed with the voluntary aid and full participation of the Commission; (2) the determination of the question of jurisdiction merely required the application of existing law to those facts and did not involve any administrative expertise, skill, or discretion; and (3) the determination of the jurisdictional question did not involve any national policy issue?

STATEMENT

Two separate issues are involved in these proceedings. The Commission devotes substantially all of its brief (ex-

cept the last 3½ pages) to the question whether the Commission has power under the Natural Gas Act ("Act")[2] to implement curtailment procedures with regard to direct industrial customers served by an interstate pipeline company. Its argument pertains to a situation where the facilities and the operation of a company are subject to the Commission's jurisdiction, such as the Commission's power to control curtailment of service by United to LP&L's Sterlington Station from the admittedly jurisdictional portion of United's system. The Commission's extensive discussion of need for administrative expertise and national uniformity relates only to this question. As noted earlier, Humble takes no position on this aspect of the case.

Humble's brief is directed to the separate question whether the Court has primary jurisdiction, in private litigation, to determine whether a portion of United's facilities is subject to the Commission's jurisdiction when such decision is essential to the determination of an ultimate issue in the private suit. In making this subsidiary determination, the Court exercised the normal legal function of applying the Act to undisputed record facts. There was no need for special administrative competence or expertise.

United's Green System, which the Court below found is not subject to the Commission's jurisdiction (United App. A, pp. 22a-25a), is located entirely within the State of Louisiana (A. 233; R. 372).[3] Such System has always (until the issuance of Opinion No. 610) been considered by the Commission, by the Louisiana Public Service

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[2] Act of June 21, 1938, as amended, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w, hereinafter cited only to code provisions.

[3] For the Court's convenience, there is attached hereto as Exhibit "A" the map which was introduced into evidence in the trial court (A. 155; 228-229; R. 252; 382) and in the Commission Docket No. CP71-89 (Exh. No. 1). This map geographically shows the location of United's Green System in Southern Louisiana.

Commission ("Louisiana PSC"), and the United States Courts[4] as well as by United, its suppliers and its customers, as a wholly intrastate or local transmission and distribution system, since the record shows that all of the gas in such System is produced,[5] transported, and consumed solely within the State of Louisiana (A. 168; 214; 223; 230; R. 275-276; 356; 372; 385). As Commissioner Carver noted in his dissent to Opinion No. 610 (United App. F, p. 127a, emphasis added):

> "For more than a decade, [United] has maintained a separate pipeline facility to serve customers in Louisiana on a strictly intrastate basis. Certification of this entity, or the purchases or sales made in connection with it, has been scrupulously avoided. *No question of its jurisdictional status has been raised by the Commission staff, notwithstanding frequent audit, inspection, and review of company operations. In every way, United's Green System-East has been held out to customers and regulators alike as a local service unit free of Federal regulatory impact and free to contract in any manner it chose, consistent with State law.*"[6]

Humble and other producers have for many years sold substantial volumes of gas to United on an intrastate

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[4] See, *e.g.*, United Gas Pipe Line Co., 30 F.P.C. 560, 561, *reh. denied*, 31 F.P.C. 1152 (1964), *aff'd.* La. Pub. Serv. Comm'n v. FPC, 359 F.2d 525, 527 (5th Cir. 1966) *cert. denied*, 385 U.S. 833 (1966) (hereinafter referred to as *"Florida Parishes"*); Louisiana Power & Light Co. v. United Gas Pipe Line Co., *et al.*, *supra*, p. 2 (United App. A, p. 24a, n. 15).

[5] Without authorization, United has from time to time introduced a minute volume of gas from the disputed zone of Federal-State domain into the Green System (T. 233).

[6] United's Green System-East, which lies south and east of its "Napoleonville-Koscuisko" interstate pipeline system, is that portion of the Green System which serves LP&L's Nine-Mile Point generating station.

basis,[7] which gas is delivered into the Green System (T. 408-412). Such gas is sold pursuant to contracts which provide, in effect, that it shall not be made subject to the Commission's jurisdiction (A. 168; 212-213; 217-218; R. 275; 354-355; 359-360; 363).

On October 1, 1970, United filed with the Commission an application pursuant to Section 7(c) of the Act, 15 U.S.C. § 717(c) (United App. D, pp. 48a-49a), requesting a certificate authorizing it to *continue* operating the Green System's facilities and to continue rendering the sales and services made by means of such facilities.[8] Notably, United filed its voluminous application only two weeks after the Secretary of the Commission wrote United inquiring whether it proposed to make any filing with the Commission in compliance with the holding of the Fifth Circuit in the *"Florida Parishes"* case, *supra*, note 4, page 5, (A. 150-151; R. 244-245), which had been finally decided four years earlier. Commissioner Carver's analysis of these events is particularly apt (United App. F, pp. 127a-128a):

> "Suddenly, in late 1970, United finds virtue in the privilege of being regulated and seeks to invoke our jurisdiction through this application. Why? United says *Florida Parishes* requires such action. I disagree, but even if that were the case, *Florida Parishes* was finally concluded in 1966 and four years is a long time for error to surface in this fashion.

[7] At other locations Humble also sells substantial volumes of gas to United in interstate commerce.

[8] Public notice of United's application in Docket No. CP71-89 was given on October 15, 1970. However, it was not until after commencement of the court proceeding here under review that the Commission did set the certificate case for hearing on May 14, 1971. United was ordered to file its direct case by May 24, 1971, and cross-examination on the direct case commenced on June 7, 1971. Hearings concluded on June 18, 1971. The Commission waived the intermediate decision procedure, and final briefs were filed with the Commission by July 30, 1971.

Another explanation, less admirable but more plausible, lies in a combination of factual coincidences. United's Green System-East serves a heavy industrial load under long-term contracts reflecting the favorable rates that prevailed when gas supplies were plentiful and pipeline capacity needed markets (footnote omitted). But between 1962 and 1970, the ratio of reserves to production for the supplies the Green System could rely upon dropped from an ample 30:1 to a dangerously low 4.6:1 . . . . Hardly surprising, then, is the fact that within the same month that this application was filed, United also sought (and ultimately received) the assurance of this Commission that implementation of an approved curtailment plan 'would be an absolute defense for United against all claims for specific performance, damages, or other requests for relief under these contracts.' United Gas Pipe Line Company, —— FPC —— (Opinion No. 606, October 5, 1971).

"* * * My reservations [to Opinion No. 606] were well founded, as evidenced by the present effort to use our jurisdiction as a shield against contracts which once appeared provident but now seem otherwise. Administrative bodies should not be insensitive to guiding principles of equity, and here there is a glaring lack of clean hands. The majority opinion concedes as much . . .".

United asserted in its application that the Green System had become subject to the Commission's jurisdiction because it had made unauthorized, uncertificated, and therefore unlawful interconnections between its interstate facilities (Exh. A, "Black System") and its intrastate facilities through which it had flowed small volumes of interstate gas into the Green System.

On March 31, 1971, one day before the effectiveness of United's curtailment plan and six weeks before the Commission set United's certificate application in Docket No. CP71-89 for hearing, but six years after the Com-

mission's decision in "*Florida Parishes*," which purportedly sparked United's filing, LP&L filed its private suit seeking to protect its vital gas supply (A. 3-11; R. 1-15).[9] In this regard, United introduced evidence pertaining to its certificate application before the Commission (A. 138; 151; R. 224; 246) and very carefully explained the theory of its case before the Commission (A. 151-157; R. 246-257). Five of United's officers and employees were examined by LP&L, United, and the Commission (A. 143; 177; 204; 219; 228; R. 232; 292; 340; 366; 381), with respect to: (1) the location of the Green System (A. 214; R. 276); (2) the type and volumes of gas flowed into the Green System, both in the past and prospectively, *i.e.*, interstate and intrastate (A. 172-173; 178-182; 230-232; R. 283-284; 294-300; 387-390); (3) United's contractual obligations to its intrastate producers (A. 168; R. 212-213; 217-218); (4) the nature of United's unauthorized operations of its interstate and intrastate facilities (A. 167; 221-225; R. 275-276; 375-376); and (5) United's motives in submitting its certificate application (A. 169-170; 176; R. 279-280; 288).

The Commission fully, actively, and voluntarily participated in the development of the record before the District Court in this private law suit. Represented by its General Counsel, it introduced evidence and cross-

[9] The District Court issued a temporary restraining order on April 27, 1971 (A. 111-113; R. 181-183), which it subsequently dissolved on April 29, 1971, on motion of the Commission and United (A. 114-115; R. 186-188) on the grounds, *inter alia*, that the District Court lacked jurisdiction over the subject matter of the complaint (see, *e.g.*, A. 114-115; R. 184-188). LP&L appealed the District Court's dismissal, and the Court of Appeals for the Fifth Circuit (one judge) vacated the District Court's judgment and reinstated the temporary restraining order (A. 117; R. 189-190). This action was sustained by a panel of the Court (A. 119-121; R. 192-196), which remanded the case to the District Court "for an expedited hearing on the jurisdictional issue and on such other preliminary issues as may properly be raised" (A. 121; R. 196).

examined witnesses, with respect to United's Green System (A. 172-173; 178-180; 182; 217-218; 223-227; R. 283-285; 293-296; 301-302; 363-364; 375-380). It was upon this record that the Court below rendered its jurisdictional conclusion, *i.e.*, one developed at a trial court of competent jurisdiction by United, LP&L, and the Commission. In evidence, when the Fifth Circuit determined the jurisdictional nature of the Green System, it performed the same function which it would perform upon review of a case arising out of a Commission proceeding.

As noted earlier, *supra*, note 1, page 2, on February 9, 1972, the Commission issued its Opinion No. 610 finding jurisdiction over, *inter alia*, United's Green System. That Opinion concluded, among other things, that the Green System is jurisdictional because such System had become integrated with United's interstate system by virtue of the gas flows into and out of the Green System (United App. F, p. 101a). But this jurisdictional predicate is contrary to the evidence. Indeed, according to Commissioner Carver (which was not denied by the majority), such Opinion seems very clearly to be based upon *ex parte* advice to the Commission by its Staff and can hardly be relied upon by this Court in concluding that the Fifth Circuit should have deferred to the Commission.[10] Commissioner Carver stated in dissenting to Opinion No. 610-A (Exh. B, pp. 154-55, emphasis in original):

> "A critical element of the jurisdictional finding is the conclusion that gas flows into *and out* of United's Green System-East and, at least on an annual basis, out of the State of Louisiana (Opinion No. 610, par. 37-38). The major producer applicants herein challenge this conclusion as not being supported by the record and erroneous in fact. My analysis, both

[10] Commissioner Carver's revelation, it should be emphasized, came after the Solicitor General's office filed its brief in this Court asserting that it believed the Commission's Opinion No. 610 was "correct."

prior to issuance of Opinion No. 610 and now, supports that position. An important principle has thus been raised and to allow the majority conclusion to go unchallenged is to acquiesce in the erosion of a fundamental concept of administrative jurisprudence.

"The majority opinion concedes at various places that it has gone beyond the actual record of this proceeding to reach its conclusions about relative volumes, peak day and annual flows, etc. (e.g., see par. 34, 35, and 41, and footnotes 4 and 5). The concept of "official notice" is a useful one and resort to it is unobjectionable when the document or other factual source is clear on its face. That is not the case here; the conclusions drawn by the majority are not self-evident from the exhibits or the noticed material themselves. In particular, any finding that gas flows *out of* the Green System-East can be derived only from an *interpretation* of flow diagrams and other technical data, involving a considerable element of expert judgment and opinion. But no witness has been presented to sponsor such an interpretation. Indeed, as to the majority conclusion (par. 38) that gas flows from the Green System-East out of Louisiana, the witness principally relied upon by the majority testified directly that all of the gas put into the Green System is consumed within the State of Louisiana (Tr. 323).

"Opinion No. 610 seems clearly to rely on advice received from the Commission's technical staff as to *interpretation* of record and noticed data on a vital point. As such, the advice received is *ex parte* in character and has not been exposed to cross-examination or rebuttal. So far as the record is concerned, therefore, the opinion is not supported by substantial evidence and should be set aside as not complying with the Administrative Procedure Act (Title 5, sec. 556(d), U.S. Code) (footnote omitted) and its judicial antecedents.

"Paragraph 4 of the present order amounts to a confession of weakness on this critical point. While

purporting to paraphrase or restate the relevant paragraphs of Opinion No. 610, it actually constitutes a substantial modification of a basic point. We are now told that gas which finds its way out of the Green System-East and transits the length of Green System-West to its juncture with Mid-Louisiana (point "U") "*appears*" to flow out of the state. This is indeed a flimsy predicate for an action having the drastic consequences referred to in my original dissent."

SUMMARY OF ARGUMENT

A.

Reversal of the lower Court's decision holding that United's Green System is not jurisdictional will irreparably injure the stability, growth, and development of the natural gas industry. Such reversal would be tantamount to approval by this Court of United's unlawful activities.

The continued stability of the natural gas industry, of which the intrastate market is an extremely important element, depends upon the validity of binding and enforceable long-term contracts between producer and pipeline. If sanctity of contract is eroded away by permitting one party by willful and unilateral action to breach its contract, the foundation of the industry will be seriously endangered.

B.

The Court below properly declined to invoke the doctrine of primary jurisdiction in the circumstances of a private law suit for an injunction where vital gas supplies were at issue. This is especially true since the Commission voluntarily intervened in the private law suit and, through its General Counsel, actively participated in the development of the record on the jurisdictional question, which record contained all the essential juris-

dictional facts necessary for the resolution of the issue. Resolution of the issue merely involved the application of existing law to undisputed facts and did not require Commission expertise. The Commission's decision on the jurisdictional question, issued after the Court's decision, cannot serve as a basis for concluding that the lower Court should be reversed since such decision is based upon erroneous factual conclusions and apparently upon *ex parte* advice by the Commission's Staff. As such, it is patently unreliable.

C.

This case does not involve the doctrine of exhaustion of administrative remedies as alleged by petitioners. As a practical matter, LP&L had no available adequate administrative remedies to exhaust when it filed its injunction suit. It was neither an applicant nor a respondent in the Commission proceeding. The cases and facts upon which petitioners rely do not support the conclusion that United's certificate case raised a question of exhaustion of administrative remedies.

ARGUMENT

A. Reversal of the Lower Court's Decision Holding United's Green System Nonjurisdictional Will Have an Irreparable Adverse Impact Upon the Natural Gas Industry

The public interest dictates that laws be obeyed, regulations followed, and violations of law not be rewarded. The Commission's suggestion that application of the primary jurisdiction rule requires reversal of the lower Court's decision as to the nonjurisdictional nature of United's Green System involves not merely a procedural decision affecting the relationship between courts and administrative agencies. It would have a far-reaching substantive impact upon the natural gas industry. In order

for this Court to appreciate how reversal of the lower Court's decision will irreparably injure the stability, growth, and development of the natural gas industry, it is only necessary to understand what United has done with respect to the Green System. Reversal of the lower Court's decision by this Court would be tantamount to approval of United's unauthorized and unlawful activities.

United's Green System has been an intrastate system for nearly two decades. United has induced producers to sell gas to it on an intrastate basis by holding such System out to be nonjurisdictional. It has also been able to entice basic industry into its market area on the grounds that it would be able to serve such intrastate customers with a gas supply elicited on an intrastate basis. From time to time over the last several years United has leaked small volumes of interstate gas into the Green System through unauthorized, uncertificated, and therefore unlawful interconnections without notice to the Commission or United's intrastate suppliers. Subsequently, United found it necessary to advise the Commission of its unlawful activities, and the Commission utilized United's unlawful acts as the basis for asserting jurisdiction over the Green System. The Commission took such action despite the fact that the Louisiana PSC has, is, and will continue to regulate the Green System in the public interest on an intrastate basis, and despite the fact that United's acts result in a unilateral breach of contract with its producers such as Humble.[11]

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[11] Humble would *emphasize* that it does not believe that its sales of gas, which gas is produced, transported, and consumed wholly within one state, are subject to the Commission's jurisdiction since such gas does not move in interstate commerce, see, *e.g.*, Peoples Natural Gas Co. v. Pub. Serv. Comm'n of Pa., 270 U.S. 550, 554 (1926); California v. Lo-Vaca Gathering Co., 379 U.S. 366 (1965); FPC v. Amerada Petroleum Corp., 379 U.S. 687 (1965). However, the Commission represented at the trial below that the "staff of the Federal Power Commission were concerned that those sales [by the

The intrastate market for natural gas in the United States is substantial and plays a vital role in our national economy. Located principally in the Nation's Southwestern states and in California, such intrastate markets serve substantial domestic and industrial customers with intrastate gas. Producers, such as Humble, play a vital role in supplying such intrastate gas because they explore for and develop gas for these particular markets. Consumer industries locate, make large capital outlays, develop the economy of the area, and become completely dependent upon intrastate systems, such as the Green System. Stated differently, basic industries have migrated into the market areas of intrastate pipelines relying upon adequate intrastate reserves to service such industries. Industries foster the development of human needs customers as well as the development of other service industries. Producers are induced to explore for and develop reserves on the assurance that they will have adequate intrastate markets. In this manner, the major intrastate markets in the Southwest have a natural-gas based economy, as distinguished from other sections of the country which can more easily rely upon other fuels, which economy is vital to the health of the national economy.

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producers] are jurisdictional sales" (A. 219; R. 363). Similarly, in Opinion No. 610, *supra*, p. 2, n. 1, the Commission stated that the "finding of jurisdiction over [*inter alia*, the Green System] raises the question of the regulatory impact on the producers who have made sales both before and after the unauthorized commingling of gas occurred on these systems" (United, App. F, p. 121a) and "permitted" the producers to file their contracts with the Commission (*ibid.*).

If Humble's sales of gas to United for delivery into the Green System were to become subject to the Commission's jurisdiction, Humble would be substantially damaged. For example, Humble sells gas to United under nine contracts. If such contracts were to be regulated on the basis of present area rates for the Southern Louisiana Area (on-shore). Humble could lose as much as $2,000,000 under such contracts for the period 1972-1976.

Reversal of the lower Court's decision would mean that there would no longer be any sanctity of contract between intrastate pipeline companies and their producers and customers. This is not a case dealing with the question of the Commission's jurisdiction resulting from enactment of a statute, see, *e.g., J. M. Huber Corp.* v. *FPC*, 236 F.2d 550 (3rd Cir. 1956) *cert. denied*, 352 U.S. 971 (1957) or a properly filed application looking toward prospective certification under the orderly processes of law. We are dealing with a situation where one party has purposefully sought to make its system jurisdictional in violation of the Act and in violation of its contracts with its suppliers, to the detriment of such suppliers, its customers, and the area which its pipeline serves.

Producers, such as Humble, have the right, at the time they enter into their contracts, and before they commence service, to determine whether they will sell their gas to interstate or intrastate markets, see, *e.g., Atlantic Refining Co.* v. *Pub. Serv. Comm'n of N. Y.*, 360 U.S. 378 (1959); *Pan American Petroleum Corp.* v. *FPC*, 339 F.2d 694, 696 (10th Cir. 1964) *rev'd on other grounds*, 381 U.S. 762 (1964); *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F.2d 404, 409 (10th Cir. 1959). There are many reasons a producer may chose one market over another. Certainly, price is an important element. Other elements in a producer's decision may involve rates-of-take, contract term, and price stability necessary for corporate planning.

Once the judgment has been made to enter into a contract to sell gas in intrastate commerce, producers, such as Humble, have the reasonable right to expect that their contracts will be respected by all concerned, *i.e.*, the right to the "realization of reasonable expectations that have been induced by the making of a promise. Doubtless, this is not the only purpose by which men have been

motivated in creating the law of contracts; but it is believed to be the main underlying purpose, . . ." *Corbin on Contracts*, Chap. 1, § 1 (1952). The viability of the Nation's natural gas industry is predicated upon the sanctity of long-term contracts such as Humble has entered into with United for the sale of gas into United's Green System. This Court has recognized that long-term supply contracts which are subject to the Commission's jurisdiction may not be unilaterally breached for private gain, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 337 (1956). Rather, the Act, by "preserving the integrity of contracts, . . . permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry," *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. at 344. As recently as April 6, 1972, the Commission itself, appears to have recognized the essential need to protect contractual rights and obligations of producers selling to pipeline companies. Thus, in a proposed rule designed to encourage exploration and development of new supplies, the Commission has laid the ground-work for certification of new producer sales at contract rates which will not be subject to revision by area rate or pipeline rate orders.[12] The result sought by United and the Commission here is at war with the Commission's own most recently expressed philosophy.

Humble's intrastate contracts with United span a period of two decades. Those contracts were entered into on an arm's-length basis in the reasonable expectation that they would be fully adhered to and respected by all interested parties, including United and the Commission. Such contracts have never been filed with the Commission, although the Commission knew, as a result of fre-

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[12] "Notice of Proposed Rulemaking and Statement of Policy Relating to Optional Procedure for Certificating New Producer Sales of Natural Gas," Docket No. R-441 (issued April 6, 1972), —— F.P.C. ——.

quent audit and inspection of United's interstate system, that United's Green System had an independent and self-sufficient source of intrastate gas supply. Certainly, these contracts were not used as a device to evade federal jurisdiction, see, *e.g.*, *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965).

There is vital importance to valid, binding, and enforceable long-term contracts in the gas industry, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, *supra*, page 16. If sanctity of producer-pipeline intrastate contracts is destroyed, the underpinnings of the natural gas industry will be rapidly eroded. In making basic decisions whether to explore for new reserves, to drill properties, or to further develop existing reserves, a producer considers the economic facts of life. Its prospective cash flow from an interstate sale may be considerably less than from a sale which could be made to an intrastate market. A producer drills and develops gas reserves on one set of assumptions. If he could know that those assumptions would subsequently become invalid, he would not drill and develop reserves in the first instance, and would devote his capital to a more reliable investment.

Of course, the producer has many known risks which he is willing to undertake. For example, he may not find any hydrocarbons or the cost of finding and developing reserves may be considerably higher than anticipated. But reversal of the Court below would introduce a new risk, a risk that the contracting purchaser might, by its own unilateral, willfull act, substantially alter the effect of the agreement and thereby destroy the basis upon which the producing industry relies.

The effect of imposition of this new risk can be graphically illustrated by positing a situation where the seller, instead of the pipeline buyer, were to abrogate its contract. Could the pipeline and its customers tolerate a

condition where, after they had invested capital and become dependent upon certain supplies, the seller could, in violation of a regulatory statute, change the terms of the contract to suit its interest?

The intrastate and interstate markets are interdependent upon one another for supplies. In a real sense, the intrastate market is supportive of the interstate market. Thus, when incentive supplied by the intrastate market is successful in finding new reserves, much of that production finds its way into the interstate market. Successful drilling in an area stimulated by intrastate markets will stimulate further drilling in such area for the interstate market. Moreover, in these times of gas supply crisis, gas in the intrastate market has been sold on an emergency basis to the interstate market and has immeasurably helped such market.[18] Without the incentives of the intrastate market such help would not now be available for the interstate market.

Petitioners clothe their argument in terms of the doctrine controlling the relationship of courts and administrative bodies. But their argument that the lower Court should be reversed is in reality no more than a naked attempt to justify abrogation of private contractual relationships upon which the industry was formed.

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[18] See, *e.g.*, Order No. 402 in Docket No. R-386 "Policy with Respect to Sales and Deliveries of Natural Gas for Resale in Interstate Commerce, by Companies With Exemptions Under Section 1 (c) of the Natural Gas Act to Alleviate Temporary Emergencies" (issued May 6, 1970) —— F.P.C. ——; and Order No. 431 in Docket No. R-418 "Policy With Respect to Establishment of Measures to be Taken for the Protection of as Reliable and Adequate Service as Present Natural Gas Suppliers and Capacities Will Permit" (issued April 15, 1971) —— F.P.C. ——.

B. The Doctrine of Primary Jurisdiction Permits Court Decision Regarding Jurisdictional Status of United's Green System. The Court Acted Reasonably in the Circumstances in Correctly Deciding Such Question

The fundamental question presented by petitioners is whether the Court below was required, by the doctrine of primary jurisdiction, in the circumstances of this injunction proceeding, to refrain from deciding the *purely legal* question of whether United's Green System is jurisdictional under Section 1(b) of the Act, 15 U.S.C. § 717 (b) (United App. D, p. 43a). The answer to this question must be made in the context of the facts of this particular case, *i.e.*: (1) the Court below had before it a complete record relating to the essential operating characteristics of the pipeline facilities involved, developed in a private law suit in a trial court of competent jurisdiction; (2) the revelant jurisdictional facts were fully developed with the voluntary aid and participation of the Commission; (3) determination of the jurisdictional question was solely one of law involving the application of the Act and guiding precedent to the undisputed facts of record; (4) determination of the question did not require any Commission expertise, skill, or discretion; (5) the question did not involve any national policy considerations upon which the Commission should have the first opportunity to pass; and (6) the primary jurisdiction question was fully briefed and argued to the Court below by all parties to the proceeding, including the Commission. Humble respectfully submits that the Court below not only had the authority to decide such question, but also that it acted reasonably in the circumstances, and that its decision was correct.

This Court has often considered the doctrine of primary jurisdiction. The application of the doctrine requires the exercise of sound discretion by the court involved, having regard to the particular circumstances of each case. The "principal reason behind the doctrine is

recognition of the need for orderly and sensible coordination of the work of agencies and of courts" 3 Davis, *Administrative Law Treatise*, § 19.01. The "principal criterion in deciding whether the doctrine is applicable . . . usually is *judicial* appraisal of need, or lack of need for resort to administrative judgment," *id.* at § 19.09 (emphasis added).

In *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952), this Court reiterated the pertinent criteria to be applied in determining whether a court should invoke the doctrine of primary jurisdiction, when it stated:

> *"The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.* This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

The case at bar clearly did not raise "issues of fact not within the conventional experience of judges." Nor did it require the "exercise of administrative discretion." On the contrary, the question of jurisdiction presented to the Court below was solely one of law requiring the application of the Act and guiding precedent to the undisputed facts of record.

It is important to note that United characterized its filing in Docket No. CP71-89, as its "*Florida Parishes*" compliance case, *supra*, note 4, page 5. The Circuit below is the Circuit which decided "*Florida Parishes*" on appeal from the Commission's decision and specifically held that its decision in "*Florida Parishes*" was not applicable to the circumstances of the Green System. Moreover, the Fifth Circuit is fully familiar with the doctrine of primary jurisdiction as it applies to the Commission since it applied such doctrine in *J. M. Huber Corp.* v. *Denman*, 367 F.2d 104 (5th Cir. 1966), and referred a question of the Commission's jurisdiction over royalty payments to the Commission for its initial determination, because such question presented national policy considerations and there was no record before the Court on the jurisdictional question or existing criteria for the Court to employ.

The Commission voluntarily and actively participated in the proceedings below and aided in the development of the record on the jurisdictional question. The Commission voluntarily intervened, responded to the pleadings filed in the proceedings below, and moved to dismiss the injunction proceedings. The Commission participated fully in the cross-examination of United's witnesses on the flow of gas in the Green System, introduced evidence on the type of gas flowed into the Green System (*i.e.*, gas sold pursuant to certificates of public convenience and necessity) and introduced into evidence the "entire excerpts from the proceedings [before the Commission] in . . . the certificate" case at the time of the injunction suit. (A. 182; R. 300). In these circumstances, Petitioners are in no position to complain that the record before the Court was inadequate and, for that reason, reference should have been made to the record before the administrative body.

The record before the Fifth Circuit contained all of the facts necessary for the resolution of the jurisdictional

question. For example, the Court below had before it: (1) United's application and evidence in Docket No. CP71-89 (A. 151; R. 246); (2) the complete theory of United's case underlying its certificate filing (A. 154-157; R. 252-257); (3) all of the necessary facts with respect to the Green System, *e.g.*, that it is located wholly within the State of Louisiana and that all of the gas in such System is produced, transported, and consumed within the State of Louisiana and does not leave such State (A. 168; R. 275-276); and (4) the nature of United's operations with respect to the Green System and its interstate facilities, including the unauthorized interconnections (see, *e.g.*, A. 178-180; R. 294-296).

In these circumstances, reference to the Commission was rendered wholly unnecessary since no Commision expertise, skill, or discretion was required. Justice Frankfurter well summarized this rule of law and the precedent upon which it is founded in a different though analogous context dissenting in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 521 (1958):

> "Contrariwise, where a decision of a case depends on determination of a question of law as such, either because of explicit statutory outlawry of some specific conduct or by necessary implication of judicial power because not involving the exercise of administrative discretion or the need of uniform application of specialized competence, the doctrine of primary jurisdiction has no function, because there is no occasion to refer a matter to the administrative agency. Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943 (reaffirmed in United States v. Western Pacific R. Co., 352 U.S. 59, 69, 77 S.Ct. 161, 167, 1 L.Ed. 2d. 126); Texas & Pacific R. Co. v. Gulf, C.&S. F. R. Co., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578; Civil Aeronautics Board v. Modern Air Transport, Inc., 2 Cir., 179 F.2d 622, 624-625; see Davis, Administrative Law, 666-668."

The Court below knew of the existence of the certificate proceedings pending before the Commission in Docket No. CP71-89 (United App. A, p. 4a). It stated, however, that it "must determine whether minor diversions of interstate gas have converted a wholly state-contained pipeline system to an interstate facility" (*id.* p. 2a). The Court below continued that "until recently, all of the gas delivered to [LP&L's Nine-Mile] station only traveled in a pipeline system, designated the 'Green System' which gathered and disposed of gas wholly within the confines of the State of Louisiana. However, in 1970, United chose to divert 2.6% of the gas supplied under its Nine-Mile Station contract into the Green System from its interstate system, designated the 'Black System'" (*id.* pp. 3a-4a). In this regard, the Court below stated that it was "particularly significant that this minor amount of interstate gas had been introduced *into* the Green system, and that no intrastate gas could flow *from* the Green system into the Black system because of the pressure differential between the systems" (*id.* p. 22a, emphasis in original). The Court thus held that these facts, among others, *supra*, page 22, did not render the Green System jurisdictional under the Act. It also concluded that neither the decision of the Fifth Circuit in *Florida Parishes supra*, note 4, page 5, nor the decisions of this Court in *California* v. *Lo-Vaca Gathering Co.* and *FPC* v. *Amerada Petroleum Corp.*, *supra*, note 11, page 13, were controlling since in all of those cases gas in the system involved was physically transported outside of the State. The Court concluded (United App. A, pp. 23a-25a, emphasis added):

> "In determining whether a particular gas delivery system is subject to federal regulation . . . [the] court must examine 'the anatomy of the pipeline system to discover the channel of constant flow' to see if, in fact, gas crosses a state line at any stage of its movement from well-head to ultimate consumption. If it does, it is interstate gas (citations omitted).

"The lower court held that this analysis of constant flow required agency expertise and that it should refuse to exercise its jurisdiction and require exhaustion of administrative remedies. *Without adopting any sweeping or dogmatic contrary rule for every imaginable case, we disagree in the case at bar. The solution to the legal problem here depends upon simple flow mechanics, which are demonstrated in this record by uncontradicted evidence. It requires no expertise to determine that the channel of constant flow, insofar as the gas passed through and consumed from the Green system is concerned, is essentially within the State of Louisiana.*

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". . . the flow of gas from the Black system into the Green system in the case at bar is occasional and irregular, as well as minimal. The Green system, as an entire and separate unit, is physically located in and functions entirely in Louisiana. Therefore, the undisputed facts show that the channel of constant flow is an intrastate and not an interstate channel. The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction (footnote omitted)."

The Court below correctly distinguished *Florida Parishes, supra,* note 4, page 5, *Lo-Vaca,* and *Amerada, supra,* note 11, page 13 (United App. A, pp. 23a-25a) since it recognized that there was no attempt here to clothe an interstate sale with an intrastate identity and that no gas in the Green intrastate system leaves the State of Louisiana once it enters such System. Further, the Green System has been regulated for many years in the public interest by the Louisiana PSC.

The Court's decision is neither more nor less of a legal determination than a reviewing court could make under Section 19(b) of the Act, 15 U.S.C. § 717r(b) (United App. D, pp. 52a-54a), which empowers a reviewing court to "affirm, modify, or set aside [a Com-

mission] order." [14] The only difference is that in this case the jurisdictional conclusion that was reached was developed on a record before the trial court, which included United's application and evidence before the Commission and was developed with the assistance of the Commission.

The Court below did not arrogate to itself a purely administrative determination since the decision which the Court rendered did not require any expertise, skill, or discretion on the Commission's part. Thus, the Court did not make the administrative or policy determination as to whether or not the Green System is entitled to a certificate, a determination which clearly requires Commission expertise under Section 7 of the Act, 15 U.S.C. § 717f. The Court's action was not only eminently reasonable in the circumstances of an injunction proceeding but clearly comported with the rule of law that the doctrine of primary jurisdiction performs no office where, as here, the question involved is a legal one traditionally considered to be within the province of the appellate courts by the "necessary implication of judicial power," *Federal Maritime Board* v. *Isbrandtsen Co., supra*, page 22, 356 U.S. p. 521.

This Court's decision in *Port of Boston Marine Terminal Assn., et al.*, v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970) cited as controlling on the question of primary jurisdiction by Mobile Gas Service Corporation, *et al.*,[15] in the context of the curtailment question,

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[14] It would appear that the courts are not precluded from passing upon the merits of legal questions which have not been passed upon by the agency involved where there is a record upon which a legal conclusion may be rendered and "persuasive reasons" exist for such action. Cf. Permian Basin Area Rate Cases, 390 U.S. 747, 823-824 (1968).

[15] See, *e.g.*, Mobile's brief at pages 12-19. Mobile contends, after reviewing the law on primary jurisdiction, that this Court's recent decision in Port of Boston, *supra*, "brings the entire line of clear, uneroded authority down to date . . .", on the question of primary jurisdiction, *id.* page 19.

is helpful to a resolution of the primary jurisdiction issue in the certificate case, although the sharp differences between *Port of Boston* and the jurisdictional issue involved here provide the basis for the different results reached. Unlike the certificate question here, in that case, the question presented was "whether a resolution of [a] dispute [between two private litigants] by the Federal Maritime Commission is binding" on one of those litigants in subsequent District Court litigation, 400 U.S. at 64. This Court held that such determination was binding.

There, the Port of Boston Marine Terminal Association ("PBMTA") was administering a tariff on file with and approved by the Federal Maritime Board ("FMB"). Without the prior approval of the FMB, the PBMTA shifted the incidence of the tariff from consignees of goods to carrier-vessels "whenever the failure to remove cargo resulted from a strike by longshoremen" 400 U.S. at 64. Certain vessels refused to pay the revised charges, and the PBMTA brought suit in a state court. Following removal to the United States District Court, the Court deferred action, pending a determination of the validity of the *change in tariff* by the FMB. The FMB found, *inter alia*, that its approval of the *tariff change* was unnecessary since it was contemplated in the tariff which PBMTA was administering.

In this Court, Rederiaktiebolaget Transatlantic argued that the District Court should not have invoked the doctrine of primary jurisdiction. This Court thought differently because the FMB was: (1) "primarily responsible for supervising . . . conferences of marine terminal operators," 400 U.S. at 68; (2) had previously approved the "very agreement that established the basic pattern of [PBMTA's] operation" which agreement was the "subject of the present dispute"; (3) the FMB had the expertise necessary to construe the agreement in "light of the

overall policies concerning terminal conferences"; and (4) most importantly, *"neither the Commission nor the government was a party"* to the District Court litigation, 400 U.S. at 69.

Thus, unlike the case at bar, this Court concluded that the District Court properly referred the issue to the FMB because it had no record on that issue, because the resolution of such issue required Commission expertise, and because the Commission was not a party to the proceeding. These are obviously decisional differences. Moreover, LP&L's complaint for injunction was not a collateral attack upon a Commission order because the Commission had not even set the case for hearing when LP&L filed its injunction suit and there was no Commission order to collaterally attack.

C. The Court Below Properly Exercised its Discretion in Declining to Invoke the Doctrine of Primary Jurisdiction

1. *The Certificate Proceeding Does Not Involve the Doctrine of Exhaustion of Administrative Remedies*

The Commission (FPC Br., pp. 7-8; 15; 35-38) and United (United Br., pp. 6-7; 19-24) base their claim that the Court below erred in deciding the jurisdictional status of United's Green System principally on the ground that the Fifth Circuit should have adhered to the doctrine of "exhaustion of administrative remedies." Humble disagrees with the premise that the mere existence of United's certificate application filing precluded court consideration of the jurisdictional issue in the circumstances of this private injunction proceeding. If the certificate case involved the doctrine of exhaustion of administrative remedies, as alleged by petitioners, this Court must inquire: "Were there any administrative remedies within LP&L's control which would have been adequate to enable LP&L to obtain an immediate Commission

determination as to whether the Green System was jurisdictional?" The urgent need of LP&L for a determination of this question was readily apparent when it is recalled that United had advised LP&L that its gas supply would be curtailed on April 1, 1971 (A. 7; R. 7).

The attached Exhibit "C" clearly shows that there were no adequate administrative remedies within LP&L's control to exhaust at the Commission at the time it filed its injunction suit against United. United's application was filed on October 1, 1970, but that application was not set for hearing by the Commission until eight months later, on May 14, 1971, and the Commission has not yet decided whether a certificate should be issued (United App. F, pp. 114a-121a). In the interim, on March 31, 1971, LP&L filed its suit for injunction seeking to restrain United from curtailing vital gas supplies at its Nine-Mile Point generating station. At any time prior to May 14, 1971, there were, as a practical matter, simply no adequate administrative remedies to exhaust.[16]

The mere filing of an application for a certificate of public convenience and necessity, in circumstances like the case at bar, is insufficient to invoke the doctrine of exhaustion of administrative remedies. LP&L simply had no control over United's application or the conduct of the hearing on United's application. Indeed, prior to May 14, 1971: (1) the Commission could have determined that United's application was deficient in several material respects and rejected such application pursuant to Section 157.8 of the Commission's Regulations Under the Natural

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[16] It is true, of course, that United's curtailment proceeding was underway in Docket No. CP71-29, *et al.*, when LP&L filed its injunction suit. Such curtailment proceeding covered jurisdictional sales and services as well as those which United asserted were jurisdictional. But the Commission specifically recognized in Opinion No. 606, issued in Docket No. RP71-29, *et al.*, that that case was not the proper forum for a determination of the jurisdictional status of the Green System (United App. E, p. 60a).

Gas Act, 18 C.F.R. § 157.8;[17] (2) United could have requested leave to withdraw such application pursuant to Section 1.11 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 1.11, since no hearing had been held or convened on March 31, 1971, or United could have amended such application to delete from it the Green System; (3) United could have severed its unauthorized interconnections thereby rendering its application moot; or (4) United could have recognized, assuming *arguendo* the Green System is jurisdictional, that the Green System, just like certain of its other facilities in Southern Louisiana, is exempt from Commission jurisdiction under Section 1(c) of the Act, 15 U.S.C. § 717 (c), since the Green System would meet all the requirements of that Section.

Moreover, while it is true that on May 14, 1971, the Commission did set the certificate case for hearing, nevertheless, on that date the Court below set the injunction proceeding for an "expedited hearing" (A. 119-121; R. 192-197), which hearing commenced on May 27, 1971 (A. 138; R. 223). At the reopened hearing in the District Court, which hearing was commenced and concluded before hearings had commenced in Docket No. CP71-89, the Commission intervened and voluntarily, actively, and fully participated in the development of the record on the jurisdictional issue. In these circumstances, the question of exhaustion of administrative remedies clearly

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[17] As noted earlier, *supra*, page 28, the Commission has not yet determined that the Green System should be certificated because United's application and evidence contained "certain deficiencies" with respect to markets, gas supply, engineering feasibility and economic feasibility (United App. F, pp. 114a-120a). The Commission admits that the evidence in the record is "insufficient to permit a determination of whether the certificate sought by United is required by the public convenience and necessity" (*id.* at 120a) and the Commission remanded the proceeding to the Presiding Examiner for receipt of additional evidence on this question (*ibid*).

became moot. The Commission's voluntary participation in this private law suit and its participation in the development of a record on the jurisdictional question, submitted such question to the jurisdiction of the Court below, and petitioners cannot now be heard to complain that the Court was without jurisdiction to render a judgment on such question as part of the injunction proceeding, simply because the Commission does not believe that such judgment was "correct" (see, *e.g.*, FPC Br., p. 35).[18]

Nor was this a case where LP&L attempted to "bypass an agency proceeding merely because [it claimed] that the agency lacks jurisdiction" (United Br., p. 19). When LP&L filed its suit for injunction there *did not exist* an active agency proceeding which could then determine the jurisdictional status of United's Green System in time to provide an adequate remedy to preserve its supplies by the April 1st deadline imposed by United.[19] United's application lay dormant for six months when LP&L's injunction suit was filed and was not resurrected for another two and one-half months until it went to hearing. Thus, LP&L did not depart an administrative proceeding midway and repair to the Court on an interlocutory basis.

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[18] The incorrectness of the Commission's jurisdictional conclusion in Opinion No. 610 is manifest when it is recalled that such jurisdictional conclusion is predicated upon erroneous facts and apparently upon *ex parte* advice (see, *e.g.*, *supra*, pp. 9-11).

[19] It is true, of course, as United asserts (United Br., p. 20) that LP&L had intervened in Docket No. CP71-89 on February 8, 1971, and was there contending that the Commission lacked jurisdiction over United's Green System. However, LP&L was not admitted as a "party" to that proceeding until May 14, 1971, when the case was set for hearing and the Commission permitted LP&L to intervene in such proceeding.

The Fifth Circuit's action must be viewed in the context of the proceedings then before it. The suit by LP&L was for an injunction—an extraordinary remedy. The application of United was purportedly a compliance filing submitted as a result of the *"Florida Parishes"* case finally decided by the Court below six years earlier. The Commission obviously had taken no energetic steps to determine whether compliance with *"Florida Parishes"* was necessary in the intervening years and it is noteworthy that even today the Commission has not decided whether a certificate should issue. Considering all these circumstances, the Court acted reasonably in exercising its discretionary power not to refer the jurisdiction question to the Commission.

2. *The Cases Which Petitioners Cite in Support of Their Position Are Inapposite to the Circumstances of This Case*

The principal cases which petitioners cite in support of their position that "questions relating to an agency's subject matter jurisdiction should be decided by the agency in the first instance" (FPC Br., pp. 15; 35-38; United Br., pp. 5-7; 19-22), *i.e.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173 (1962); *FPC* v. *Arkansas Power & Light Co.*, 330 U.S. 802 (1947), *rev'd mem.*, 156 F.2d 821 (D.C. Cir. 1946), which had reversed 64 F. Supp. 907 (D.C. D.C. 1945); and *McKart* v. *United States*, 395 U.S. 185 (1969), are fundamentally inapposite to the circumstances of this case for several reasons.

In the first place, one would be hard put to find an absolute rule of law requiring that *all* questions of agency jurisdiction be decided in the first instance by the agency. If there were such a rule, the doctrine of primary juris-

diction would be rendered meaningless as a judicial tool enabling a court to determine when an agency's expertise should be called into play. Secondly, the cases upon which petitioners rely deal with the doctrine of exhaustion of administrative remedies, which is not involved here, since this case involves the application of the doctrine of primary jurisdiction. Thirdly, such cases evidence this Court's profound concern that an agency's processes remain free from unwarranted and unreasonable interference by the Courts. In this case, however, LP&L did not attempt to enjoin the Commission from proceeding with the certificate case. Accordingly, there was no unwarranted interference with the Commission's processes by either LP&L or the Court below.[20] The Commission voluntarily participated in the lower Court proceedings and did not feel that such participation would jeopardize its standing to hold hearings on United's certificate application or from rendering its own judgment on the merits of such certificate application.

In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), Bethlehem Shipbuilding Corporation, Ltd., among others, brought suit to enjoin the National Labor Relations Board from proceeding with hearings on a complaint alleging unfair labor practices against Bethlehem. The District Court granted the injunctive relief requested without any record on the jurisdictional question and such determination was sustained on appeal. This Court stated that the "question for decision is whether a federal District Court has equity jurisdiction

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[20] United attempts to demonstrate how LP&L's injunction suit has interfered with the Commission's processes (United Br., pp. 21-22). Aside from the significant fact that the agency was not enjoined from conducting its hearings, the short and dispositive answer to this contention is that the Commission has issued its Opinion No. 610. Certainly, the Commission did not feel constrained from rushing to judgment with its jurisdictional conclusion as evidenced in its Opinion No. 610 (United App. F, pp. 121a-124a).

to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by the National Labor Relations Act . . .", 303 U.S., at 43, and held that the District Court was without power to so enjoin the Board, *id.* at 47. This Court protected the agency's processes from unwarranted interference by the District Court, especially in the circumstances where there did not exist a record of "undisputed facts" on the jurisdictional question. Here, as stated above, the Commission's processes have continued to function.

Similarly, in *Arkansas Power & Light Co.* v. *FPC*, 64 F.Supp. 907 (D.C.D.C. 1945), *rev'd*, 156 F.2d 821 (D.C. Cir. 1946) *rev'd mem.*, 330 U.S. 802 (1947); Arkansas Power & Light Co. ("AP&L") sought, *inter alia*, an injunction against the Commission from continuing with a proceeding involving AP&L. Here again, as in *Myers*, there was an unwarranted attempt to interfere with the agency's processes and no record developed on the jurisdictional issue.

Here, however, there was no unwarranted interference by the Court below with the Commission's processes, as there was in *Myers* and *Arkansas Power & Light Co.*, *supra*. In sharp contrast, as noted above, and as Commissioner Carver stated in his dissent to Opinion No. 610 (United App. F, pp. 130a-131a):

> ". . . this Commission was not an original party [to the case before the Fifth Circuit] but chose voluntarily to intervene for the purpose of arguing its primary jurisdiction (footnote omitted). Knowingly and purposefully, it submitted to the jurisdiction of the courts which have so far considered the matter. 'An administrative body which submits a legal question to a court of competent jurisdiction is bound by its judgment' *Otis & Co.* v. *SEC*, 176

F.2d 34 (CADC, 1948) (holding as summarized in Headnote 4)".[21]

This Court's decision in *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173 (1962), is also inapplicable to the circumstances of the case at bar. This case also involved a question of exhaustion of administrative remedies and required an expert finding as to what constitutes a labor organization. There, a state trial court had asserted jurisdiction over a labor

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[21] Otis was reversed on other grounds by this Court in a memorandum opinion 338 U.S. 843 (1949) citing Myers, *supra*, page 31, as controlling. But this Court's reversal does not detract from the principle set forth in Commissioner Carver's dissent. There, the Securities and Exchange Commission ("SEC") sought enforcement of a subpoena in the United States District Court in connection with a "public investigation" it was conducting to determine whether Otis had violated the Securities and Exchange Act. Before the District Court had an opportunity to pass upon the merits of the enforcement application, the SEC instituted a separate investigation into Otis' activities, on the basis of the "public investigation," to determine whether Otis should be expelled or suspended from the National Association of Securities Dealers, Inc. Otis sought an injunction against this latter proceeding in the District Court pending a determination of the enforcement application, which injunctive relief was granted. Thereafter, the District Court denied enforcement of the subpoena on the grounds that the record in the "public investigation" did not make the requisite *prima facie* showing of fraud to pierce the attorney-client privilege. Otis again moved for an injunction prohibiting the SEC from proceeding with the separate investigation on the grounds that the District Court's conclusion was *res judicata* on the issue of fraud. The District Court dismissed the complaint and the United States Court of Appeals for the District of Columbia Circuit reversed on the grounds that the District Court's decision was *res judicata*.

Obviously, however, the lower court could not have enjoined the SEC from proceeding with an otherwise valid substantive investigation involving the same subject matter solely because the District Court denied enforcement of a subpoena. In those circumstances Otis had a duty to exhaust its administrative remedies. But it seems clear that the SEC could not have enforced its subpoena collaterally where the issue had been determined by the District Court. On this question the District Court's decision would have been *res judicata* because it was submitted to the Court and determined by the Court.

dispute which was arguably within the jurisdiction of the National Labor Relations Board and had enjoined the Marine Engineers Beneficial Association and its Local 101 from, *inter alia*, picketing the Interlake Steamship Co. The trial court's injunction was sustained by the Minnesota State Supreme Court which had determined that the labor organizations involved "were not 'labor organizations' within the meaning of § 8(b) of the Labor Management Relations Act, . . . and therefore not subject to the unfair labor practice provisions of that section of the statute," 370 U.S., at 174. This Court reversed and stated that "it has hardly been disputed, nor could it be, that the petitioners' conduct was of a kind arguably prohibited by § 8(b)(4)(A) of the Act and thus within the primary jurisdiction of the Board, if MEBA and Local 101 were 'labor organizations' within the contemplation of Section 8(b) generally (footnote omitted)," *id.* at 176-177.

This Court held that it could foresee "no reason to assume that the task of interpreting and applying the statutory definition of a 'labor organization' does not call for the same *adjudicatory expertise* that the Board must bring to bear when it determines the applicability of §§ 7 and 8 of the Act, to substantive conduct. *Indeed, analysis of the problem makes clear that the process of defining the term 'labor organization' is one which may often require the full range of Board competence,*" *id.* at 178 (emphasis added). In this regard this Court alluded at various times to the "informed discretion" of the Board, *id.* at 178, note 6, the "policy considerations" which the Board must consider, *id.* at 181, and the necessity of the Board to be "free in the first instance to consider the whole spectrum of possible approaches to the question," *ibid.*, of what constitutes a "labor organization" under the Act. Moreover, as this Court noted, there was "persuasive evidence" that the petitioner was a labor organization within the scope of the relevant legislation and that the "state

court was shown not simply the arguable possibility of Labor Board jurisdiction over the controversy before it, but that the Board had *actually determined* the underlying issue upon which its jurisdiction depended, i.e., that MEBA was a 'labor organization' for purposes of Section 8(b) of the Act," *id.* at 184 (emphasis added).

The case at bar simply does not present comparable circumstances. Here, the jurisdictional question was solely one of law, which did not require agency expertise and which the Court had ample authority to decide.

The teaching of *McKart* v. *United States*, 395 U.S. 185 (1969) is helpful in these circumstances. *McKart* would see doctrines such as the exhaustion of administrative remedies read broadly and not circumscribed by artificial application. There, the United States brought suit against McKart for willfully and knowingly failing to report for induction into the armed services. At the trial, McKart defended by asserting that he should be exempt from military service on the basis of the "sole surviving son" exemption. The District Court held that such defense was unavailable because McKart had failed to raise this defense to his classification in the appellate processes employed by the Selective Service System. This Court reversed, holding that the doctrine of exhaustion of administrative remedies did not preclude raising this defense at the trial. Importantly, this Court noted that the "doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions (footnote omitted). Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved," 395 U.S. at 193. Although the holding of this Court appears to be narrowly confined to the administrative process involved in *McKart*, the broad teaching of that case is especially appropriate here, 395 U.S. at 197-199 (emphasis added):

"The question of whether petitioner is entitled to exemption as a sole surviving son is, as we have seen, solely one of statutory interpretation. The resolution of that issue does not require any particular expertise on the part of the appeal board; the proper interpretation is certainly not a matter of discretion (footnote omitted). In this sense, the issue is different from many Selective Service classification questions which do involve expertise or the exercise of discretion, both by the local boards and the appeal boards (footnote omitted). Petitioner's failure to take his claim through all available administrative appeals only deprived the Selective Service System of the opportunity of having its appellate boards resolve a question of statutory interpretation. *Since judicial review would not be significantly aided by an additional administrative decision of this sort, we cannot see any compelling reason why petitioner's failure to appeal should bar his only defense to a criminal prosecution* (footnote omitted). There is simply no overwhelming need for the court to have the agency finally resolve this question in the first instance, at least not where the administrative process is at an end and the registrant is faced with criminal prosecution (footnote omitted)."

This Court recognized that questions of law need not be passed upon in every instance by the agency involved where the question is one of statutory construction, requiring no agency expertise.

3. *The Facts Upon Which Petitioners Rely Do Not Support Their Position*

Both petitioners (FPC Br., pp. 36-38; United Br., p. 25) would have this Court *reverse* the lower Court's decision holding that United's Green System is not subject to the Commission's jurisdiction. However, the basis for their position, *i.e.*, issuance of Opinion No. 610, is without foundation since that Opinion is, as Commis-

sioner Carver charges, based upon erroneous facts and apparently upon *ex parte* advice. Certainly, the Solicitor General and this Court cannot rely upon that Opinion since it violates the Administrative Procedure Act, 5 U.S.C. § 556(d).[22]

In any event, one of the principal arguments petitioners put forth is that the "court below did not have before it all the evidence which had been before the Commission" (FPC Br., p. 38; United Br., p. 24, n. 19). Thus, it is argued that the record before the Commission on the jurisdictional question was more extensive than that before the Court below.[23] However, comparison of the two records clearly reveals that the same

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[22] As noted above, the Commission would have this Court "reverse" the Court below on rather unique terms, *i.e.*, the Commission does not believe the lower Court's decision is *correct* in light of the Commission's Opinion No. 610 and "proper review of [Opinion No. 610] can best be effected on the basis of the full administrative record. Accordingly, the decision of the court of appeals on this point should be reversed so that review of the Commission's decision may proceed in due course under Section 19(b)" of the Act (FPC Br. pp. 35-36).

Even assuming *arguendo* that this Court were to accept the Commission's argument as to exhaustion of administrative remedies, the proper course would be to set aside the lower Court's decision, not reversal, since, as the Commission argues, the record before this Court does not "afford an adequate basis for resolving the jurisdictional issue" (FPC Br., p. 15).

[23] Both petitioners point with emphasis to the size of the record before the Commission in Docket No. CP71-89, *i.e.*, "1,276 pages of transcript, 63 exhibits and 10 items by reference" (FPC Br., p. 38). The Commission and United imply that all of this evidence was on the "jurisdictional issue." But any such implication is demonstrably incorrect. The record before the Commission on the jurisdictional issue consisted of only approximately 350 pages of transcript which dealt not only with United's Green System but also with United's so-called "Purple System." The reason it is more extensive than the record before the District Court is because United's evidence was cross-examined by at least six parties including the Commission Staff. This is also true with respect to the exhibits and items by reference.

essential jurisdictional facts were before both the Court and the Commission. For example, both records demonstrate: (1) that United had flowed small volumes of gas from its interstate Black System into its intrastate Green System (compare United App. A, p. 22a, and United App. F, pp. 101a and 102a); (2) the application and evidence filed by United in Docket No. CP71-89 (A. 151; R. 246) as well as the "entire excerpts from the proceedings in . . . the certificate" case at the time of the injunction suit (A. 182; R. 300); (3) the theory of United's certificate case and jurisdictional position (A. 151-158; R. 252-257); (4) when the unauthorized flows commenced (A. 157; R. 258); (5) that all of the gas introduced into the Green System is produced,[24] transported, and consumed in the State of Louisiana and does not leave the State of Louisiana (A. 168; R. 275-276); (6) that the Green System's facilities are located wholly within the State of Louisiana (A. 168; R. 275); (7) the type of gas introduced into the Green System, *i.e.*, interstate or intrastate (A. 173; R. 283-284); (8) the extent of United's unauthorized interconnections (A. 155; R. 253); (9) that gas cannot flow from the Green System into United's interstate facilities and that gas can only flow from the interstate facilities into the Green System by turning "valve or other regulating" devices (A. 180; R. 297); and (10) that United would be required to flow greater volumes of gas from its interstate facilities into the Green System in the future (A. 181-182; R. 299).

On these facts, the Court below stated that the Green System is located "entirely within the State of Louisiana" (United App., p. 22a) and that it is "particularly significant that this minor amount of interstate gas had

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[24] The Commission's record shows that small volumes of gas from the disputed zone of Federal-State domain were occasionally introduced into the Green System.

been introduced *into* the Green System and that no intrastate gas could flow *from* the Green System into the Black System because of the pressure differential between the systems. Although a physical connection permits the Black to Green flow, *the two systems are otherwise entirely separate facilities*" (*ibid.*, emphasis added). This conclusion is supported by the evidence developed at the trial and is also consistent with the record developed before the Commission in Docket No. CP71-89.

It is upon these *essential jurisdictional facts* which were before both the Court and the Commission, that the Court concluded, on the basis of "*Florida Parishes*," *supra*, note 4, page 5, and other cases,[25] that the Green System was not jurisdictional.[26] There was simply no basic difference between the *essential jurisdictional facts* before the Court and the Commission.

The Commission found that substantial volumes of interstate gas would have to be flowed into the Green System in the future (United App. F, pp. 102a-103a). This factor was also a matter of record before the Court below but constitutes no ground for concluding that Commission jurisdiction over the Green System exists. If United will be required to flow substantial volumes of interstate gas into the Green System in the future, it should apply for a certificate and explain to the Commission and other interested parties precisely what transactions it will engage in which it believes will render the Green System jurisdictional.

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[25] California v. Lo-Vaca Gathering Co. and FPC v. Amerada Petroleum Corp., *supra*, note 11, page 13.

[26] The Commission's conclusion in Opinion No. 610 (United App. F, pp. 104a-106a) that gas flows outside of the State of Louisiana from the Green System is directly contrary to the evidence developed through United's witnesses in both the trial court and the hearings in Docket No. CP71-89, as pointed out by Commissioner Carver, and not denied by the majority, in Opinion No. 610-A, Exhibit B, page 55.

Moreover, the Court below did not ignore this fact as United asserts (United Br., p. 24). Under the holding below, the volume of gas introduced into the Green System is not decisionally significant since the "channel of constant flow" is the relevant criterion.

United asserts that the "jurisdictional result in the certificate case depends on a complicated factual analysis of interstate gas flows into and out of the New Orleans District and on the application of the commingling doctrine (citations omitted)" (United Br., p. 23). This argument is simply not sustainable. There are no complicated gas flows on the Green System. The gas enters United's Green System at one end of such System and travels in only *one* direction, *i.e.*, from southeast to northwest, until it is consumed within the Green System. No gas in the Green System leaves such System for destiny outside of the State of Louisiana. Moreover, the application of the commingling doctrine is a legal chore which the United States Appellate Courts are eminently well qualified to undertake.[27]

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[27] United asserts in this connection that the record before the Fifth Circuit was for the "limited purpose of showing the nature of the issue being considered by the FPC (citations omitted)" (United Br., p. 24). But this argument is unavailing. The important point is that a record reflecting the essential operating characteristics of the pipeline facilities involved was before the Fifth Circuit for review.

Finally, United implies that the Court below followed the wrong legal theory in concluding that the Green System is nonjurisdictional (United Br., p. 24, n. 20). Thus, United asserts that the Court below adopted the "*de minimis* concept discredited by this Court . . ." (*ibid.*), see, *e.g.*, *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515 (1945) and *FPC* v. *Florida Power & Light Co.*, —— U.S. ——, No. 70-38 (January 12, 1972). However, it does not appear from the lower Court's opinion that the Court below relied exclusively, if at all, upon this concept in arriving at its jurisdictional conclusion. Rather, the Court below determined that the "channel of constant flow" of the gas produced, transported, and consumed in the Green System did not make such System jurisdictional because such "channel of constant flow is an intrastate and not an interstate channel" (United App. A, p. 25a).

4. *Section 19(b) of the Act Does Not Preclude an Appellate Court from Deciding a Purely Legal Question on Undisputed Facts*

United asserts that "under normal circumstances a court must not only give an agency the opportunity to make the initial determination of agency jurisdiction, but must also permit that jurisdictional determination to be reviewed pursuant to the statutory review procedures rather than in a collateral suit" (United Br., p. 23). This argument completely misses the mark. There is no doubt that Commission orders should be reviewed only by the statutory review procedure prescribed by Section 19(b) of the Act, 15 U.S.C. § 717r(b) (United App. F, pp. 52a-54a), and should not be reviewed collaterally in the United States District Courts or in the state courts. That is the purpose of Section 19(b) which provides in pertinent part that any "party to a proceeding under this chapter aggrieved by an *order issued by the Commission* . . . may obtain a review of such order in the court of appeals of the United States

. . ." (*ibid.*, emphasis added).[28] But, Section 19(b) does not preclude the United States Appellate Courts from deciding purely legal questions on facts developed in a trial court of competent jurisdiction. Unlike the cases which United cites, there was no Commission order here involved when LP&L filed its suit for injunction, and Section 19(b) of the Act was simply not applicable at that time.

[28] Certainly, the cases which United cites, *e.g.*, City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958); Colorado Interstate Gas Co. v. FPC, 209 F.2d 717 (10th Cir. 1953) *rev'd on other grounds*, 348 U.S. 492 (1955); Algonquin Gas Transmission Co. v. Gregory, 105 F. Supp. 64 (D. Conn. 1952); Whitney National Bank in Jefferson Park v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965) stand for the proposition that an agency order should properly be reviewed only by the method prescribed by the statute involved.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should sustain the lower Court's determination that it had the authority to decide, and did correctly decide, the jurisdictional status of United's Green System.

Respectfully submitted,

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By /s/ Sherman S. Poland
SHERMAN S. POLAND

Dated at Washington, D. C.
this 12th day of April, 1972

MAP IS TOO LARGE

EXHIBIT B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 610-A

Docket No. CP71-89

UNITED GAS PIPE LINE COMPANY

OPINION AND ORDER DENYING APPLICATIONS FOR REHEARING, PETITION FOR AN INVESTIGATION AND MOTION FOR STAY

Issued: April 7, 1972

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; John A. Carver, Jr., Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

Opinion No. 610-A

Docket No. CP71-89

UNITED GAS PIPE LINE COMPANY

OPINION AND ORDER DENYING APPLICATIONS FOR REHEARING, PETITION FOR AN INVESTIGATION AND MOTION FOR STAY

(Issued April 7, 1972)

NASSIKAS, Chairman:

1. A number of parties [1] have filed applications for rehearing of the Commission's Opinion No. 610 and order, issued February 9, 1972, wherein we found that this Commission has jurisdiction under the Natural Gas Act over the facilities, transportation and sales for resale of natural gas by United Gas Pipe Line Company (United) by means of and from its interstate facilities within United's Victoria and New Orleans Divisions in the States of Texas and Louisiana, respectively.

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[1] New Orleans Public Service Inc. and the City of New Orleans (jointly), Texas Gulf Sulphur Company, Boise Southern Company, Texas Gas Transmission Corporation, Louisiana Gas Service Company, Louisiana Power and Light Company, Gulf States Utilities Company, Cities Service Oil Company, Shell Oil Company, Humble Oil & Refining Company, Texaco Inc., and State of Louisiana, Louisiana Municipal Association, Parish of Cameron and Louisiana Public Service Commission (jointly).

2. Additionally, the State of Louisiana and the Louisiana Public Service Commission request an investigation of alleged violations of "the Natural Gas Act and of Gas Reserves", and move to stay Opinion No. 610 and the remanded proceedings.

3. The applications for rehearing challenge the Commission's assertion of jurisdiction on various grounds, all of which have been considered and treated by the Commission in Opinion No. 610. We do not believe that further discussion is necessary. There have been certain allegations of erroneous factual conclusions, however, to which further comment would be appropriate.

4. Several parties, whose arguments are directed to the Green System-East, contend the Commission erroneously concluded that gas from the Green System-East leaves the State of Louisiana. They argue that there is nothing in the record to show that gas actually flows out of the state and that annual flow diagrams filed as a part of FPC Form 2 actually show flows at point "U" going to Baton Rouge. At paragraphs 37 and 38 of the Opinion, we stated that gas from the Green System-East enters the Green System-West, flows into the interstate pipeline of the Mid-Louisiana Gas Company at point "U" and thereafter appears to flow out of the state. In noting the flows of gas into Mid-Louisiana Gas Company's interstate pipeline it was not our purpose to trace the flows of particular molecules of gas to any given point, but merely to recognize that gas originating in the Green System-East is ultimately commingled with interstate flows.

5. Texaco Inc., asserts that there is an error in paragraph 25 of the Opinion wherein the Commission described gas flows from the De Large Field. It contends that the Commission erred in concluding that gas entered the Green System-East from the De Large Field. The Commission does not so state in paragraph 25, nor is such a conclusion intended. Despite the fact that the

De Large field gas does not enter the Green System-East, interstate gas including deliveries from the De Large Field is used to serve the Dulac area. Texaco Inc. also notes that the Commission's opinion omits the fact that several small isolated sections of transmission facilities in the Green System-East do not receive commingled flows. This has no bearing on the Commission's general assertion of jurisdiction over the New Orleans Division and is a matter which will be considered at the time that particular facilities are before us for certification.

6. Boise Southern Company (Boise) alleges that Opinion No. 610 contains a substantial misstatement of fact relating to those facilities by means of which it receives its gas deliveries. It notes that, contrary to the Commission's statement in paragraph 12 of the Opinion, the interconnection at point "A" has been certificated by the Commission [2] as was a 12-inch line which interconnected with Texas Eastern's 30-inch line. The only other transmission line used to serve Boise is 6.1 miles of 8-inch line. Boise argues that any assertion of jurisdiction over the 8-inch line should have been made at the time of certification in Docket No. CP67-26, and that in the absence thereof it had the right to understand that no further authorization from the Commission would be required. A review of the Commission's order in Docket No. CP67-26 indicates that certain facilities at point "A" were certificated by the Commission. This factual clarification, however, does not give substance to Boise's argument. The fact that additional facilities utilized to serve Boise were not certificated previously does not exempt United's facilities serving Boise from our assertion of jurisdiction.

7. Texas Gas Transmission Corporation's application for rehearing is directed solely to the Commission's order that deliveries by United be continued on a emergency

[2] Commission order issued on July 22, 1969, in Docket No. CP67-26 (42 FPC 157).

basis pending the conclusion of the remanded proceedings. It urges the Commission to impose interim volumetric limitations on United's customers affected by this case at the levels which correspond to the maximum takes of such customers in the past as reflected in the record. The issue of volumetric limitations upon certification is one that is to be taken up in the remanded proceedings as we believe the record evidence thereon is presently insufficient. In the interim we have provided that such deliveries shall be subject to curtailment in the same manner as United's other customers.

8. Texas Gulf Sulphur Company, which was granted late intervention by Commission order, issued March 31, 1972, asserts that the Commission was in error in not ordering United to cease further violations of the Natural Gas Act. It further contends that the Commission erred in ordering United to amend in any way its direct sales contracts or to make its direct sales subject to United's FPC Gas Tariff without the consent of its direct customers to the application of such tariff provisions or to any changes therein. Contrary to Texas Gulf Sulphur's assertion the Commission has not ordered United to amend its direct sales contracts. In authorizing United to continue its deliveries on an emergency basis we have, however, imposed certain conditions which we believe are in the public interest.

9. The State of Louisiana and the Louisiana Public Service Commission request an investigation of violations of the Natural Gas Act and of gas reserves alleging that there has been a "deliberate, extensive and wilfull violation by United of the prohibition of Section 7(e) of the Natural Gas Act against any proposed construction of extension of facilities which shall constitute the transportation or sale of natural gas subject to the jurisdiction of the FPC without first obtaining a certificate of public con-

venience and necessity authorizing such acts or operations." This allegation appears to us to be inconsistent with the position taken by these parties that the Commission does not have jurisdiction over the facilities in question. Nevertheless, in finding the New Orleans Division jurisdictional on the basis of unauthorized gas flows, we stated that the Commission's jurisdiction under the Natural Gas Act does not depend upon whether a natural gas company fulfills its obligation thereunder to obtain a certificate of public convenience and necessity. We refrained, however, from issuing a certificate of public convenience and necessity for any of the facilities, sales or services as we found that the record requires amplification. Among the matters to be addressed in the remanded proceedings would be the justification for United's initiation of flows into the New Orleans Division, as well as the requirements of the New Orleans Division for United's interstate flows. The latter would, of course, require a review of gas reserves within the New Orleans Division. Thus, we believe that the remanded proceedings will permit a resolution of these issues. Accordingly, we shall deny the State of Louisiana and the Public Service Commission's petition.

10. The State of Louisiana and the Louisiana Public Service Commission while expressing opposition to the reopening of the record, alternatively request that the record be broadened to include certain information specified in Appendix A of Special Order No. 7/71 of the Louisiana Public Service Commission, issued February 28, 1971. In the remanded proceedings the parties will have an opportunity to present evidence bearing on all issues related to certification. Requests for data may be directed to the Presiding Examiner. As for the motion for stay we do not believe that it would serve the public interest to stay our order and delay the remanded proceedings.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing filed in this proceeding present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 610 and accompanying Order except as that Opinion is clarified above.

The Commission orders:

(A) The applications for rehearing of the Commission's Opinion No. 610 and order, described herein are denied.

(B) The petition for an investigation of violations of the Natural Gas Act and gas reserves and the motion for stay filed by the State of Louisiana, Louisiana Municipal Association, Parish of Cameron and Louisiana Public Service Commission are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended.

KENNETH F. PLUMB
Secretary

[SEAL]

Docket No. CP71-89

UNITED GAS PIPE LINE COMPANY

(Issued April 7, 1972)

CARVER, Commissioner, *dissenting*:

My dissent to Opinion No. 610 was broadly stated as embracing a wide array of legal, policy, and procedural differences with the conclusions of the majority, but refrained from any extensive analysis of those issues because the *res judicata* question seemed so clearly dispositive of the proceeding at that time. I remain of that opinion, but feel compelled to comment briefly on two of the substantive matters raised by certain of the parties in their applications for rehearing and not satisfactorily resolved in this order.

A critical element of the jurisdictional finding is the conclusion that gas flows into *and out of* United's Green System-East and, at least on an annual basis, out of the State of Louisiana (Opinion No. 610, par. 37-38). The major producer applicants herein challenge this conclusion as not being supported by the record and erroneous in fact. My analysis, both prior to issuance of Opinion No. 610 and now, supports that position. An important principle has thus been raised and to allow the majority conclusion to go unchallenged is to acquiesce in the erosion of a fundamental concept of administrative jurisprudence.

The majority opinion concedes at various places that it has gone beyond the actual record of this proceeding to reach its conclusions about relative volumes, peak day and annual flows, etc. (e.g., see par. 34, 35, and 41, and footnotes 4 and 5). The concept of "official notice" is a useful one and resort to it is unobjectionable when the document or other factual source is clear on its face. That is not the case here; the conclusions drawn by the

majority are not self-evident from the exhibits or the noticed material themselves. In particular, any finding that gas flows *out of* the Green System-East can be derived only from an *interpretation* of flow diagrams and other technical data, involving a considerable element of expert judgment and opinion. But no witness has been presented to sponsor such an interpretation. Indeed, as to the majority conclusion (par. 38) that gas flows from the Green System-East out of Louisiana, the witness principally relied upon by the majority testified directly that all of the gas put into the Green System is consumed within the State of Louisiana (Tr. 323).

Opinion No. 610 seems clearly to rely on advice received from the Commission's technical staff as to *interpretation* of record and noticed data on a vital point. As such, the advice received is *ex parte* in character and has not been exposed to cross-examination or rebuttal. So far as the reocrd is concerned, therefore, the opinion is not supported by substantial evidence and should be set aside as not complying with the Administrative Procedure Act (Title 5, sec. 556(d), U. S. Code)[1] and its judicial antecedents.

Paragraph 4 of the present order amounts to a confession of weakness on this critical point. While purporting to paraphrase or restate the relevant paragraphs of Opinion No. 610, it actually constitutes a substantial modification of a basic point. We are now told that gas which finds its way out of the Green System-East and transits the length of Green System-West to its juncture with Mid-Louisiana (point "U") "*appears*" to flow out of the state. This is indeed a flimsy predicate for an action having the drastic consequences referred to in my original dissent. Nor is it clear how gas entering Mid-

[1] ". . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence . . ."

Louisiana facilities at or near the Baton Rouge city gate can leave the State. As Texaco's application for rehearing states, Mid-Louisiana's line from the Monroe Field extends in a southerly direction and terminates at Baton Rouge. Its function is to carry gas across a corner of Mississippi back into Louisiana. Gas entering that line at point "U" goes only into Baton Rouge and is consumed there.

Until this proceeding at least, the *Florida Parishes* case represented a high water mark in the use of the commingling theory as a jurisdictional rationale. In its very first paragraph, Opinion No. 610 lays the foundation for the conclusion that that case is controlling here. This ignores a whole host of differences in the two situations, only one of which needs mention for present purposes. The question in *Florida Parishes* was whether intrastate sale of incidental amounts of gas taken from a transmission line which was an integral part of an interstate operation required our certification. Here, the facts are diametrically opposite: at most 3 or 4 percent of the volumes carried by an otherwise separate and distinct intrastate facility may have their origin in sources dedicated to the interstate market. To claim that a situation which was concerned with a 100 percent interstate supply source is identical or even comparable with one that is more than 96 percent intrastate is to reduce all problems and issues to the same dimensions. The public interest demands a better sense of perspective on the part of this Commission.

/s/ John A. Carver, Jr.
JOHN A. CARVER, JR.
Commissioner

EXHIBIT C

COMPARISON OF SIGNIFICANT DATES

UNITED GAS PIPE LINE CO. Docket No. CP71-89	LOUISIANA POWER & LIGHT CO. v. UNITED GAS PIPE LINE CO., *ET AL.*, Case No. 71-2550
1970	
OCTOBER 1, 1970:	
United files certificate application in Docket No. CP71-89, seeking certificate for, *inter alia*, Green System (A. 151; R. 245-246).	
OCTOBER 15, 1970:	
Commission "notices" United's application in Docket No. CP71-89 (A. 152; R. 248).	
1971	
FEBRUARY 12, 1971:	
LP&L files untimely petition to intervene in FPC Docket No. CP71-89 (A. 152; R. 248).	
	1971
	MARCH 31, 1971:
	LP&L files complaint for injunction (Civil Action No. 16, 637) against United, seeking to enjoin United from curtailing gas supply to, among others, LP&L's Nine-Mile Point generating station (A. 3-12; R. 1-16).
	APRIL 27, 1971:
	District Court issues temporary restraining order (A. 111-113; R. 181-183).
	APRIL 29, 1971:
	District Court dissolves temporary restraining order on motion of Commission and United (A. 114-116; R. 186-188).

MAY 14, 1971:

Commission sets Docket No. CP71-89 for hearing and permits LP&L to intervene in such proceeding (A. 153-154; R. 250-251).

JUNE 7, 1971:

Hearings commence in Docket No. CP71-89 (A. 154; R. 252).

JUNE 18, 1971:

Hearings conclude in Docket No. CP71-89.

JULY 30, 1971:

Final briefs filed with Commission in Docket No. CP71-89.

1972

FEBRUARY 9, 1972:
Commission issues Opinion No. 610.

MARCH 3, 1971:

Fifth Circuit (one judge) vacates District Court's judgment of dismissal and reinstates temporary restraining order (A. 117; R. 189-190).

MAY 14, 1971:

Panel of the Fifth Circuit affirms vacation of District Court's judgment of dismissal and remands case to District Court "for an expedited hearing on the jurisdictional issue and on such other preliminary issues as might properly be raised" (A. 119-121; R. 192-197).

MAY 27, 1971:

Reopened hearing commences and concludes before District Court (A. 138; R. 223).

JUNE 30, 1971:

District Court dismisses complaint (A. 266; R. 439).

1972

JANUARY 14, 1972:

Fifth Circuit Court of Appeals enters opinion and judgment.